was looked upon as a grafter or as lacking in good sense. One thing was accomplished: the constitution was amended to restore the evident intent of the Civil Code that cases should not be reversed unless there was a miscarriage of justice. As a result there are now few reversals, but crime continues just the same.

The popular "goat" this time is the probation and parole system, although the facts establish conclusively, in San Francisco at least, that less than ten per cent of the persons arrested for felony are put on probation, and a very small percentage paroled. Furthermore, most of those on probation and parole made good. No one is more keenly alive to the defects of the probation and parole system than the officers in charge of it. Probation officers are usually overworked, underpaid, and never equipped with the medical and psychiatric assistance that would enable them to find out the kind of men they are dealing with. Admitting all the mistakes of probation and parole, it accounts for but a small part of the miscarriages of justices. There is the lack of co-ordination in the police departments—the lack of modern training and equipment in each department. The police and sheriffs have their favorite criminals to protect. The same is true of the district attorney, the police judge and the judge of the superior court. Further, the officials of one county often find it necessary to oblige the officials of another county. From the prosecuting witnesses to the governor, there is a hierarchy of persons who can block a criminal prosecution. There is no concentration of responsibility. Power and responsibility are divorced.

In the last analysis the fault lies with the people. They insist on electing officials for short terms and demand that all officers, whether elected or appointed, shall be good fellows—that when a friend is arrested on a criminal charge, or the friend of a friend, the official shall do the right thing as a personal favor and dismiss the case, or if there is influence brought to bear in favor of prosecution, inflict a light sentence. As long as we feel that way about it and want nothing better, conditions will remain about the same.

---

# Comment on Recent Cases

CORPORATIONS: POWER TO GUARANTEE CONTRACTS OF OTHER CORPORATIONS—In the case of the *Woods Lumber Company v. Moore,* the Goldstein Company, part of whose business was the renting of theatrical costumes, guaranteed the payment of an obligation owing to the Woods Lumber Company by the Continental Producing Company, for building material. The Goldstein Company had rented costumes to the Continental Producing Company and the building materials were necessary for the success of a theatrical production. The Goldstein Company was held liable on the guaranty. It was considered within the implied corporate

powers, being helpful to the conduct of its business and tending directly to promote the same.[1]

Whether or not one corporation has the implied power to guarantee the contracts of another corporation is a question upon which there is comparatively little adjudication in California.[2] Originally a corporate contract beyond the powers expressly conferred was considered null and void.[3] The modern tendency is more to treat a private corporation as an association of individuals. This necessarily means that a broader view is being taken as to the functioning capacity of a corporation.[4] As a general rule, with the exception of guaranty companies, there can be no implied power of one corporation to guarantee the contracts of another.[5] The reasons given for the rule are threefold. Firstly, the shareholders should be entitled to limit the corporate funds to purposes indicated by the corporate charter. Secondly, such a guaranty would overstep the authority expressly and impliedly conferred by the state. Thirdly, to permit such a guaranty might be inequitable to other corporation creditors who lent credit relying upon the fact that it, the corporation, was engaged only in the particular business in which it purported to be engaged.[6]

It would be assuming a great deal to attempt to formulate a general rule as to the precise limits of the guarantee power of a corporation in California. Section 354 of the Civil Code expressly enumerates certain corporate powers and provides that a corporation has the power to enter into any obligations essential to the transaction of its ordinary affairs, or for the purposes of incorporation. Section 355 is a negative grant of incidental powers, stating that no corporation shall possess any corporate powers, except such as are necessary to the exercise of the powers so conferred. The cases give a liberal interpretation to the word "necessary" fixing the test as one of reasonableness" rather than of "absolute necessity."[7] In Lowe v. The Central Pacific Railroad Company, it was held that a lessee railroad corporation has the power to guarantee the bonds of another railroad corporation, its lessor.[8] It would therefore seem that, if the contract of guaranty, according to the standard of reasonable business usage, could be

---

[1] (Aug. 10, 1920) 60 Cal. Dec. 181, 191 Pac. 905.

[2] For California cases in point cf. supra, n. 1; Hall v. Auburn Turnpike Co. (1865) 27 Cal. 256; Lowe v. The Central Pacific R. R. Co. (1877) 52 Cal. 53, 28 Am. Rep. 269; Seeley v. San José Independent Mill and Lumber Co. (1881) 59 Cal. 22; Smith v. Ferris etc.,R. R. Co. (1897), 5 Cal. Unrep. Cas. 889, 51 Pac. 710. For general consideration of the scope of corporate powers cf. Bates v. Coronado Beach Co. (1895) 109 Cal. 160, 41 Pac. 855; McQuaide v. Enterprise Brewing Co. (1910) 14 Cal. App. 315, 111 Pac. 927.

[3] Straus v. Eagle Ins. Co. (1855) 5 Ohio St. 60.

[4] Stockton v. Central R. R. Co. (1892) 50 N. J. Eq. 52.

[5] 11 Ann. Cas. 891; 10 Cyc. 1109, § 7.

[6] Supra, n. 5.

[7] Supra, n. 2; also see cases cited in instant case. Woods Lumber Co. v. Moore (Aug. 10, 1920) 60 Cal. Dec. 181. For resumé of cases in other jurisdictions cf. 27 L. R. A. (N. S.) 186; 10 Cyc. 1109, § 7; 11 Ann. Cas. 891; 70. Am. St. Rep. 163, 164; 12 Cent. Digest, cols. 1889-1891, §1815.

[8] Lowe v. The Central Pacific R. R. Co. (1877) 52 Cal. 53, 28 Am. Rep. 269.

expected to advance the business of the guaranteeing corporation, it would properly fall within the scope of the implied corporate powers. Such a rule was applied in the instant case and is conducive to the transaction of business in the more usual way.[9]

*H. A. M.*

COURTS: EFFECT OF AN OVERRULING DECISION—The Supreme Court of California in San Pedro Railway Company v. City of Los Angeles[1] decided that leasehold interests in tide lands were not property within the meaning of the taxing laws. Nevertheless, the city of Los Angeles, disregarding this decision, taxed the leasehold interest of Outer Harbor Dock & Wharf Company, a corporation. The tax was paid under protest by the last-named corporation who, in *Outer Harbor Dock and Wharf Company v. City of Los Angeles,*[2] sued to recover from the city the tax thus paid. While the case was pending and after the opening brief of the appellant was filed in the District Court of Appeal the decision in the San Pedro Railway Corporation case was overruled.[3] The plaintiffs nevertheless contended that the overruled decision was the law of the state for four years and was as effective as a statute. As a corollary, it was argued that the collection of the tax from Outer Harbor Dock & Wharf Company was unlawful, for the reason that the tax, illegal when made, could not be validated by a subsequent decision declaring it legal.

The court however refused to sanction the contentions of the plaintiff, and held that when there are conflicting decisions, the earlier one must be deemed wrong and the latter right, and that the later decision determines the rights and duties of the parties, even though the transaction out of which they sprung occurred before this decision was rendered. By way of dictum the court intimated that under certain circumstances an exception would be made, in cases where equity and justice demand it.

The exception is a departure from our traditional common law theory. On the other hand, the general rule sanctioned in the principal case is a natural consequence of the common law theory that judges do not make law; that their function is *jus dicere non jus dare*[4]; and that in the King and Parliament, to use the words of Hale, is vested the legislative power.[5] The opinions of the judges, on this theory, since they do not make law, are but renewed evidence of it;[6] what they say or have said was never

[9] Supra, n. 1.

[1] (1914) 167 Cal. 425, 139 Pac. 1071.

[2] (Aug. 30, 1920) 33 Cal. App. Dec. 45.

[3] San Pedro etc. Ry. Co. v. City of Los Angeles (1919) 57 Cal. Dec. 273, 179 Pac. 393.

[4] Sir Francis Bacon, Essay on Judicature.

[5] History of the Common Law (4th ed.) 67.

[6] 1 Jones' Blackstone Intro. 69-71; Yates v. Lansing (1811) 9 Johns (N. Y.) 395, 6 Am. Dec. 290; Swift v. Tyson (1842) 41 U. S. (16 Pet.) 1, 10 L. Ed. 865. Austin ridicules this view of Blackstone. For a good discussion of the proposition that judges do make law, see Dicey, Law and Opinion in England, Lecture XI; Maine, Ancient Law, Chap. II.